IN THE

Supreme Court of the United States

October Term, 1977

No. **77-1115**

IN THE MATTER

OF

The Petition of ROBERT M. LALLI,
Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,
Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS.

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CASES:

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16, paragraph (1) (b), of the Rules of the Supreme Court of the United States, appellee moves this Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

Jurisdiction.

Appellant appeals from a final judgment rendered by the Court of Appeals of the State of New York, entered

on November 17, 1977, affirming the decree of the Surrogate's Court of Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates, Powers & Trusts Law, Section 4-1.2 is constitutional.

Question Presented.

The limited question presented to this Court is whether the adherence by the Court of Appeals of the State of New York to its previous decision is consistent with the decision of this Court in deciding *Trimble v. Gordon,* 430 U. S. (1977).

Statute Involved.

Estates, Powers and Trusts Law §4.1-2, 17B, McKinney's Consolidated Laws of New York, 531-532, provides as follows:

§4-1.2 *Inheritance by or from illegitimate persons*

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from

the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Statement.

Decedent died intestate on January 7th, 1973. The natural mother of the appellant predeceased the decedent, having died on October 11th, 1968. The appellant alleges that he is the child of the decedent, was born out of wedlock in 1948, and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on his behalf.

On August 26th, 1974, the appellant filed a petition seeking a compulsory accounting. On October 1st, 1974, appellee served a notice of motion to dismiss on the ground that the appellant was not a distributee. Appellee's motion to dismiss was granted by the Surrogate by the opinion of the Surrogate dated November 15th, 1974 (Appendix A) and the Court of Appeals unanimously affirmed by its opinion dated November 25th, 1974 (Appendix B). On remand by this Court, the Court of Appeals of the State of New York adhered to its previous decision by an opinion rendered November 17th, 1977 (Appendix C).

It must be reiterated that at no time during the decedent's lifetime did the appellant seek any judicial determination that he was in fact the son of the decedent as is required by EPTL 4-1.2.

Argument.

We believe that there is no substantial doubt as to the constitutional validity of Estates, Powers & Trusts Law, Section 4-1.2, and that the constitutional issues in this case do not require plenary consideration by this Court. We believe that the judgment rests on an adequate non-federal basis and does not present a substantial federal question. Hence we submit that this Court should dismiss the present appeal.

The Illinois statutory scheme with regard to inheritance by or from illegitimate persons and the determination by the Supreme Court of the United States with regard to that statute in *Trimble v. Gordon*, 430 U. S. (1977).

Section 12 of the Illinois Probate Act provides in relevant part:

> "An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate."

The Illinois statute allowed an illegitimate child to inherit from its mother only as distinguished from its father except that an illegitimate child whose parents

intermarried and who is acknowledged by the father as the father's child shall be considered legitimate and can inherit on that basis. No provision was made in the Illinois law for a judicial determination of paternity for the purposes of inheritance and no illegitimate child in Illinois or no representative of such illegitimate child can bring a judicial proceeding to have the child declared a child of the alleged illegitimate father. A clear distinction was made in Illinois between a claim of a child with regard to inheritance against its natural mother as opposed to a claim of an illegitimate child against its alleged father for inheritance purposes. The Illinois statute when contrasted with the New York statutory scheme bears no relationship in that the New York statutory scheme permits an illegitimate child to inherit both from its natural mother and natural father and provides for a judicial proceeding for the purposes of determining parentage as to the alleged putative father for the obvious reason that from a physiological point of view it is far easier to determine the natural mother than the natural father.

The United States Supreme Court when considering the Illinois statute in *Trimble v. Gordon, supra,* by a divided court distinguished *Labine v. Vincent,* 401 U. S. 572 (1971), and held that the analysis by the Illinois Supreme Court of the Illinois statute (§12 of the Illinois Probate Act) vis-à-vis the Fourteenth Amendment of the United States Constitution (Equal Protection Clause) was perfunctory and incomplete.

In *Labine v. Vincent,* 1971, 91 S. Ct. 1017, 401 U. S. 532, 28 L. Ed. 2d 288, this Court upheld the constitutionality of a Louisiana statute which contained succession provisions relating to the right of illegitimate children to share in intestate distributions. In specifically denying illegitimates the right to take under state laws

of succession, the Court distinguished a claim to share in an estate by reason of intestacy from claims to share in the proceeds from wrongful death actions as in *Levy v. Louisiana*, 391 U. S. 68, and *Glana v. American Guar. Co.*, 391 U. S. 73.

> "The Legislature was attempting to provide fair and reasonable standards for proving rights to participate in an estate. There are obvious reasons for different provisions in respect of the mother's estate and that of the putative father. The Legislature found good reason for requiring a court determination of paternity and for prescribing a limitation of time."

Surely the New York statute is as fair and reasonable as Louisiana's.

It is respectfully submitted that the New York statute in question and the courts of this state have given adequate consideration to the statute's proper objective of assuring accuracy and efficiency in the disposition of property at death, something which apparently was not done by either the Legislature or courts of the State of Illinois and that the New York statute is, as required by the Supreme Court of the United States, "carefully tuned to alternative considerations."

In this regard it is important to note that had the appellant in the *Trimble* case, *supra*, been a resident of the State of New York and had she made her claim under the New York statute now before this Court, she could have been successful in establishing her right to inherit. The illegitimate had, in Illinois, obtained an order of the Illinois court during the putative father's lifetime determining paternity and determining which putative father was indeed the father of the illegitimate.

Such an order under EPTL 4-1.2 would have allowed the illegitimate to inherit from her father since no distinction is made in New York between the right of an illegitimate to inherit from either its mother or father once the paternity of the father is established in a judicial proceeding.

It is respectfully urged that the Supreme Court determination in *Trimble v. Gordon, supra,* is limited on its facts to the peculiar statute in Illinois declared unconstitutional. Since the Illinois statute bears no relationship to the New York statute which clearly provides a constitutional framework with regard to inheritance by illegitimates, the determination by the Supreme Court in the *Trimble* case, *supra,* should not affect the holding in this case.

CONCLUSION.

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Opinion of Surrogate's Court Westchester County

SURROGATE'S COURT

WESTCHESTER COUNTY

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of

MARIO LALLI,

Deceased,

to render and settle her accounts as such Administratrix.

HENKIN, HENKIN & QUINN,
Attorneys for Petitioner

MURIEL LAWRENCE,
Attorney for Respondent

BARWSTER—S.

This is a motion to dismiss a petition for a compulsory accounting on the ground that the petitioner, an illegitimate person, has no status as a distributee to compel an accounting. Petitioner attacks the constitutionality of the statute on descent and distribution of a decedent's intestate property as it applies to illegitimate issue on the grounds that it is a denial of equal protection under the Constitution of the United States (Fourteenth Amendment) and the Constitution of the State of New York (Article I, §11).

Decedent died on January 7, 1973. The mother of petitioner predeceased the decedent. The constitutional issue was initially raised on the application by an alleged son for letters of administration. However, no determination was made at that time since the widow who had a prior right to letters, duly qualified and was appointed administratrix on December 26, 1973.

The petitioner in this compulsory accounting proceeding states that he and his sister are children of decedent; were born out of wedlock; and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them. They do state, however, that they were supported, in part, by the decedent during his lifetime. Petitioner and his sister claim to be lawful distributees of the decedent together with decedent's widow. They further claim that EPTL §4-1.2(2) which would deny them a share in the estate of decedent as distributees by reason of their illegitimacy without an order of filiation having been made during the life of the father declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child, is unconstitutional and therefore void. The motion by the administratrix to dismiss the petition relies on the constitutionality of the aforesaid statute, asserting that even if the proof is offered which establishes that decedent was the father of petitioner and his sister or contributed to their support, nevertheless they are not distributees by virtue of the statute and petitioner has no status to compel an accounting by the administratrix.

This is not a novel issue. The exclusion of illegitimates, as distributees under various state statutes has already

been considered by the courts. In recent years the United States Supreme Court has on three separate occasions considered the constitutionality of the complex set of rules regarding the rights of illegitimate children in the statutes of the State of Louisiana. In the case of Levy v. Louisiana, 391 U. S. 68, the denial of the right of an illegitimate child to recover damages for the wrongful death of his mother was declared unconstitutional. In a second case, Glona v. American Guarantee, 391 U. S. 73, the Louisiana statute that denied the right of a mother to recover damages for the wrongful death of her illegitimate child was also declared unconstitutional. Next was decided the case of Labine v. Vincent, 401 U. S. 532, in which the right of the State of Louisiana to make laws for distribution of property, even to the exclusion of illegitimates, was upheld as constitutional. After considering the restrictive provisions under Louisiana law with respect to illegitimates, the Court held:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collat-

eral relations, as opposed to ascendants, and against ascendants, as opposed to descendants.

• • • • •

"It may be possible that some of these choices [of distribution of an intestate's property] are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. • • • We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." Labine v. Vincent, supra, pp. 537-539.

The New York law on inheritance by or from illegitimate persons is set forth in EPTL §4-1.2 which provides in part as follows:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiati

declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) • • • • •"

This statute has been somewhat eroded by constitutional attacks made upon some of its provisions as applicable to certain types of cases. In so far as the statute would limit and restrict the rights of illegitimate children who have suffered pecuniary injuries to share in the distribution of damages recovered in an action for the wrongful death of their putative father, it has been declared unconstitutional (Matter of Ortiz, 60 Misc 2d 756). But even in the Ortiz case it was pointed out that the Legislature may in its absolute discretion designate one class of beneficiaries to inherit and another class to receive the damages for wrongful death. Referring to the equal protection clauses of the U. S. Constitution (Fourteenth Amendment) and the Constitution of the State of New York (Article I §11) the court said:

"These provisions do not forbid unequal laws and do not require every law to be equally applicable to all persons (Barbier v. Connolly, 113 U. S. 27). Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably—reasonably being measured in terms of a proper legislative purpose." p 759.

Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the court further stated:

"But some difference does exist in such relationships at least with respect to the greater difficulty in ascertaining paternity. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy. To the mother however, the birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is a child of a particular woman is rarely difficult to prove. Proof of paternity on the other hand as experience has shown is a much more difficult problem.

• • • • •

"It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate *inheritance* from the father. In such a statute the illegitimates' rights often come into direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin." Matter of Ortiz, supra, p. 761.

The constitutionality of the restrictions limiting illegitimates to inherit from their father in certain cases only was considered in Matter of Crawford, 64 Misc 2d 758. The court stated at page 763:

". . . It is urged that this limitation creates an arbitrary classification as to infants, where there is no filiation order within two years from the date of birth. The test to be applied 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without much basis.' (Truax v. Corrigan, 257 U. S. 312, 337; Matter of Posner v. Rockefeller, 31 A D 2d 352.)

"The limitations upon the right of an illegitimate child to inherit from its father are set forth in absolute fashion in the statute. The two-year limitation provision is not akin to the Statute of Limitations found in section 517 of the Family Court Act but rather it establishes a 'rule of substantive law, a statute prerequisite • • • a condition precedent' to the qualification of the infant as a distributee under EPTL 4-1.2.

"The legislative intent is clear on this point: 'Since inheritance from the father of an illegitimate has always been intertwined with proof of paternity, it is recommended that only a limited right of inheritance from the father be permitted. The child is only permitted to inherit from the father where a court of competent jurisdiction (which under present law in most cases will be the Family Court) has made an order declaring paternity during the lifetime of the father in a proceeding commenced within two years after the birth of the child.' (Fourth Report of Temporary State Comm. on Law of Estates, 1965, p. 37; N. Y. Legis. Doc., 1965, No. 19.)

"Such limitations are not arbitrary or capricious, but were adopted by the Legislature to avoid post-

death litigation. (Matter of Consolazo, 54 Misc 2d 398; Matter of ABC v. XYZ, 50 Misc 2d 792; Matter of Middlebrooks v. Hatcher, 55 Misc 2d 257.)"

Matter of Hendrix, 68 Misc 2d 439 considered anew the constitutionality of EPTL §4-1.2 and after a full discussion of the many cases involving the same concluded "that the New York statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate". p. 444. In Matter of Bolton, 70 Misc [2] 814, the court reconsidered the statute anew, reaffirmed its constitutionality and despite the fact that decedent had admitted paternity in an affidavit, it held that only full compliance with the provisions of EPTL §4-1.2 could entitle an illegitimate child to inherit from the putative father. The court stated: "It is for the Legislature and not the court to overcome the restrictive elements of this statute." p. 819.

Cases involving wrongful death cited by the petitioner in which limiting provisions of the statute were voided as unconstitutional are not determinative of the issue here. As pointed out by the court in Labine v. Vincent, supra, p. 536:

> "The cause of action alleged in Levy was in tort. The court held that the state could not totally exclude the illegitimate children who were unquestionably injured by the tort. Levy did not say that a state can never treat an illegitimate child differently from legitimate offspring."

The Supreme Court of New Jersey clearly pointed out the distinguishing elements in the claims of illegitimates to damages for wrongful death of a putative father as opposed to inheritance from a decedent. In Schmoll v. Creecy, 54 N. J. 194, the court stated:

> "... There are of course differences between a wrongful death statute and an inheritance statute. A wrongful death statute itself determines who shall benefit, and the decedent has no voice in the matter. On the other hand, an inheritance statute embodies no more than the presumed intention of decedents who do not express their wish. It may therefore be urged that our inheritance statute does not generate a distinction between legitimate and illegitimate children but merely reflects the probable intent of individuals who are themselves constitutionally free to draw that line and who presumptively subscribe to the view of the statute by omitting to direct otherwise by will. Then, too, at least in the case of a male decedent, there is fear of spurious claimants, a problem more formidable in estate situations than in wrongful death actions in which the amount of the recovery will depend critically upon the amount of pecuniary injury shown."

Finally, the court observes that while the limitation in EPTL §4-1.2 on bringing an action to declare paternity within two years from the birth of the child has been declared unconstitutional as an irrational discrimination between two classes of individuals, namely public welfare officials and others (Wales v. Gallan, 61 Misc. 2d 831), nevertheless the requirement that it be done during the lifetime of the father, giving him a chance to contest the same, is

obviously a rational requirement and constitutionally sound. The attempt to prove paternity at this date comes too late.

Accordingly, the court determines that EPTL §4-1.2 is applicable to the alleged son of decedent, that he is not a distributee of the decedent herein and that he lacks status to petition for a compulsory accounting by the administratrix. The motion to dismiss is granted.

Settle order.

November 15, 1974

EVANS V. BREWSTER
Surrogate

APPENDIX B.

Opinion of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Surr. Ct. No. 440

In the Matter of the Accounting of ROSAMOND LALLI as the Administratrix of the Estate of Mario Lalli, deceased,

ROBERT M. LALLI,
Appellant,

—v.—

ROSAMOND LALLI, as Administratrix &c.,
Respondent.

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(440)

HENKIN AND HENKIN
Mt. Vernon
(LEONARD M. HENKIN of counsel)
for appellant.

AVSTREIH, MARTINO & WEISS
Mt. Vernon
(LEONARD A. WEISS of counsel)
for respondent.

Jones, J.

We hold that Section 4-1.2(a)(2) of the Estates, Powers and Trusts Law is not unconstitutional to the extent that it prescribes the entry during the father's lifetime of an order of filiation declaring paternity as a condition precedent for inheritance by an illegitimate child from his or her father.

In this case an illegitimate son, over 25 years of age at the time of his father's death, sought an order in Surrogate's Court for a compulsory accounting by the administratrix of his deceased father's estate. The administratrix, the decedent's widow, moved to dismiss the son's application on the ground that he was not a distributee and hence had no standing to compel an accounting.

The facts are undisputed. Appellant and his sister were the natural son and daughter of the decedent, having been born on August 24, 1948 and March 19, 1950, respectively. Respondent administratrix had been married to the decedent for some 34 years prior to the decedent's death on January 7, 1973, during which time the decedent and she had resided together as husband and wife. The natural mother of appellant and his sister had died on October 11, 1968. It was not contested that during his lifetime the decedent had provided financial support for both appellant and

his sister. Additionally it appeared that when appellant wished to be married in April, 1969 parental consent was required because he was then under age 21. Incident to the granting of such consent the decedent had acknowledged that appellant was his son in a writing sworn to before a notary public. It is agreed, however, that there was never any order of filiation.

The Surrogate granted respondent's motion to dismiss the application for a compulsory accounting on the ground that appellant was not a distributee under EPTL 4-1.2(a)(2). In so doing the Surrogate rejected appellant's contention that § 4-1.2(a)(2) is unconstitutional. On direct appeal pursuant to CPLR 5601(b)(2) we affirm.

Section 4-1.2, bearing the heading, "Inheritance by or from illegitimate persons", provides in pertinent part:

> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

• • •

Appellant's assault on § 4-1.2(a)(2) is grounded in contentions that its provisions deny him the equal protection of the law assured him under State and federal constitutions and the due process of law to which he is entitled under the federal constitution. In disposing of his challenge we address three aspects of asserted constitutional infirmity: first, the difference in proof of parenthood necessary to establish the right of inheritance from a natural father as contrasted with the proof required to establish the right of inheritance from a natural mother; second, the insistence that there be an order of filiation; and third, insistence that the order of filiation be made during the lifetime of the natural father.[1]

At the threshold we recognize a material distinction between benefits and rights to which an illegitimate child is entitled in consequence of the fact that he or she is the child of his or her parent on the one hand, and, on the other, expectations only to which such a child may look forward in consequence of a child-parent relationship. The former category includes entitlement to the proceeds of a wrong-

[1] Since this appellant's claim to status as a distributee is foreclosed by the provision of § 4-1.2(a)(2) that the order of filiation must be made during the lifetime of the natural father, a provision the constitutionality of which we here uphold, we do not reach the challenge addressed to the separate provision of the statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (§ 4-1.2[a][2]). We intimate no views with reference to the asserted unconstitutionality of that provision.

ful death action (*Levy* v. *Louisiana*, 391 US 68; cf. *Glona* v. *American Guaranty Co.*, 391 US 73); to workmen's compensation benefits (*Weber* v. *Aetna Cas. & Surety Co.*, 406 US 164); to financial support from a father (*Gomez* v. *Perez*, 409 US 535); to social security benefits (*Jimenez* v. *Weinberger*, 417 US 628). In such cases the applicable standard for review as to constitutionality is that sometimes labeled strict scrutiny (a compelling state interest in the objective sought and the least restrictive means for achieving that objective [cf. *Montgomery* v. *Daniels*, —— NY2d ——, ——]).

As appellant concedes, however, the test in the present instance (involving only an inchoate expectancy at best) is whether there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible state objective. (*Labine* v. *Vincent*, 401 US 532; cf. *Montgomery* v. *Daniels*, *supra*, p. —). We have no difficulty in concluding under this less stringent test that there is a reasonable basis for each of the three distinctions which the Legislature has prescribed and which appellant attacks.

In the first place, given the state of our present knowledge in the field of genetics, it cannot be gainsaid that the identification of a natural mother is both easier and far more conclusive than the identification of a natural father. It may be one day that, notwithstanding the nonparticipating role of the father at birth, scientific tests will nonetheless be available by means of which the fact of fatherhood can be demonstrated as compellingly as is presently true with respect to the fact of motherhood. Clearly such proof is not available today. In this circumstance we conclude that the Legislature acted rationally in prescribing a specially defined procedure for establishing the fact of father-

hood. Once that fact is established in the formal manner required by the statute, the right of an illegitimate child to inherit from his father is the same as his right to inherit from his mother, and exactly the same as if he had been born in wedlock. There is no discrimination against illegitimacy. The difference exists only with respect to the means by which the fact of fatherhood is to be established, and then for sound and understandable reasons.

Secondly, we cannot say in the face of practical problems and difficulties associated with proof of fatherhood that it is irrational to require the formality of a court order adjudicating the fact of paternity. We recognize, of course, that in particular instances, a duly acknowledged written statement of paternity, or conclusive proof of substantial and continuous financial support may be very compelling. But even in such instances, under familiar principles an apparent admission of paternity may be negated by proof of misrepresentation, fraud, duress or other vitiating circumstance. To require the formality and conclusiveness of a judicial determination is not irrational.

Finally, we conclude that it was not irrational, either, to lay it down as a condition precedent that the order of filiation must be made during the lifetime of the natural father. The father may be expected to have greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process. Beyond that, and perhaps even more important, by their very nature the statutes of descent and distribution serve as an expression of the presumed intention of the deceased for the distribution of his property on his death, absent any

effective testamentary or *inter vivos* disposition. No one questions that a natural father may disinherit his son notwithstanding that the fact of fatherhood has been conclusively established in a paternity proceeding; he has only duly to execute a will appropriate for that purpose. Similarly a father may effectively provide for the distribution of all or any part of his property to an illegitimate child notwithstanding that there has been no order of filiation. Since, then, the ultimate question of whether a son shall inherit lies within the volitional determination of the father, it is not unreasonable to require in addition to a highly reliable standard of proof of parenthood, that the alleged father have personal opportunity to participate, if he chooses, in the procedure by which the fact of his fatherhood is established.

Accordingly the decree of Surrogate's Court, Westchester County, should be affirmed.

• • • • •

Decree affirmed, with costs. Opinion by Jones, J. All concur.

Decided November 25, 1975

APPENDIX C.

Opinion of New York Court of Appeals

STATE OF NEW YORK COURT OF APPEALS

SURROGATE COURT

No. 560

In the Matter of

ROBERT M. LALLI,

Appellant,

vs.

ROSAMOND LALLI, as Administratrix &c of
Mario Lalli, Deceased,

Respondent.

(560)

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Mt. Vernon,
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LEONARD A. WEISS,
Mt. Vernon,
for respondent.

JONES, *J.*

This case is now before us on remand from the Supreme Court of the United States for further consideration in the light of *Trimble* v. *Gordon* (430 U.S. ——). We adhere to our previous decision (38 N.Y.2d 77).

At the outset we observe that the standard to be applied in our review, while "less than strictest scrutiny", is nonetheless "not a toothless one" (perhaps in the sense that it

would be a "toothless" standard if it could be satisfied by a mere finding of some remote rational relationship between the statute and a legitimate state purpose) (430 U.S. ——).

We find the Illinois statute which was before the Court in *Trimble* significantly and determinatively different from the New York statute. Under the former the right of an illegitimate child to inherit from his father depended not only on proof, by way of the father's acknowledgement, of the fact of paternity, but on proof as well that the parents had intermarried (Ill. Rev. Stat. ch 3, § 12 [1961]; cf. Ill. Rev. Stat. ch 3, § 2-2 [1976-1977 Supp.]). By contrast, under our New York statute the right to inherit depends only on proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father (Estates, Powers and Trusts Laws. § 4-1.2, subd [a], par [2]).[1]

In our analysis the Illinois statute focuses on a requirement that the family relationship be "legitimatized" by the subsequent marriage of the parents. Thus, there was a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there were no doubt whatsoever as to paternity.[2] The Supreme Court held unacceptable

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[1] As we noted when this case was initially before us, inasmuch as we uphold that provision of the statute which forecloses this appellant's claim to status as a distributee because no order of filiation was made during the lifetime of his father, we do not reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (EPTL 4-1.2, subd [a], par [2]; 38 NY2d 80, fn).

[2] We observe that this appears to have been the case in *Trimble* itself. A paternity order had been entered during the lifetime of the father finding Gordon to be the father of the child, Deta Mona (430 US ——). On the facts there would have been no question but what Deta Mona would have been entitled to inhert from her father under the New York statute.

such a statutory provision which penalized children born of an "illegitimate relationship" between their parents—concluding that the sins of the parents are not to be visited upon their children. There is nothing similar in our statute; it is concerned only with proof of paternity and the establishment of a blood relationship between the father and the child.

In another aspect we note that even with respect to the issue of paternity there is a different emphasis in the two statutes. Illinois requires in a conclusory form only that the child be "acknowledged by the father as the father's child". New York, on the other hand, is evidently concerned not only with the fact of paternity but with the form and manner, and thus the availability, of its proof, i.e., by order of filiation.

The Supreme Court explicitly recognized the inherently more difficult problems of proof of paternity than of maternity and acknowledged that the states have a legitimate interest in making provision for the orderly settlement of estates and the dependability of titles to property passing under intestacy laws (430 U.S.).

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." (430 U.S.).

The issue here appears to turn, then, on whether a state may constitutionally require as proof of paternity a judicial determination made during the lifetime of the father. We find nothing in *Trimble* which forecloses this possibility; specifically we do not, as appellant would have us, read footnote 14 at page as forbidding such a requirement The preference for judicial determinations with respect to title to real property has a long and respected history and provides an available record. In effect our statute requires that the determination of paternity be made in the formality of a judicial proceeding in consequence of which there will follow an order of filiation and a permanent, accessible record. If a father is prepared to execute a formal acknowledgment of paternity (a prerequisite which appears clearly to be acceptable to the Supreme Court), obtaining an order of filiation will not be burdensome. Nor do we perceive the seeds of constitutional infirmity in the requirement that the judicial determination be made within the lifetime of the father. As we noted before, the father "may be expected to have a greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process." (38 NY2d 82.) Indeed a formal acknowledgment of paternity, apparently found in *Trimble* to be an acceptable requirement, obviously entails personal participation by the father during his lifetime.

Finally, we would merely note, if *Trimble* is to be read as inviting exploration of the intent of the Legislature in adopting the particular statute, that research of counsel as well as our own has disclosed no relevant materials with respect to the enactment of § 4-1.2(a)(2). We could speculate as to the details of legislative intentions, and so could

others. To us it is clear, even in the absence of specific legislative materials, that this statute serves a legitimate state purpose—in the language of *Trimble*, to make provision for "the orderly settlement of estates and the dependability of titles to property passing under intestacy laws". We know of nothing, and there is nothing in the record, to suggest that our statute was intended as a moral, ethical or social disparagement of illegitimacy or was the product of proponents whose objective, even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms.

For the reasons stated we conclude that our statute meets the constitutional guidelines articulated in *Trimble*. Accordingly, the decree of Surrogate's Court, Westchester County, should be affirmed, with costs.

Cooke, *J.* (dissenting):

Admittedly, the Illinois statute recently declared unconstitutional by the Supreme Court of the United States is significantly different from the New York statute (EPTL, 4-1.2, subd [a], part [2]). Nevertheless, it is respectfully submitted that our statute is likewise unconstitutional in light of *Trimble* v. *Gordon* (430 U.S. 762).

In *Trimble*, the Supreme Court was careful to delineate the boundaries of its inquiry, thus explaining that

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance (430 U.S. at p. 771).

The Court also recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally" (Id. at p. 770). Nevertheless, considering the Illinois statute, the court reasoned:

> We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed (Id. at pp. 770-771).

Furthermore, concerning the interests of the states in the accurate and efficient disposition of property, the Court commented:

> Evidence of paternity may take a variety of forms, some creating more significant problems of inaccu-

racy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. at p. 772, n. 14).

Applying the equal protection analysis employed by the Supreme Court in *Trimble* necessitates consideration of the relation of our statute to our State's "proper objective of assuring accuracy and efficiency in the disposition of property at death" (430 U.S. at p. 770). Of course, our statute is not mindless nor totally irrational and a concern for solid proof of paternity is a legitimate state purpose. But if the court is now required to put teeth into its scrutiny, we are obliged to go beyond the purpose of the statute to a consideration of the rationality of the burden it places on the State's illegitimate children.

A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, *ipso facto*, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often result simply from the fact that the putative father is supporting and acknowledging the children as

his own. Or, it might well be and often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.

The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Court Act, § 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in the eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of *Trimble* it must be concluded that the statute leaves the "middle ground" of what a state may legitimately require and settles on the side of complete exclusion.

In *Trimble*, the Supreme Court reasoned that a paternity order obtained for purposes of requiring the father to provide support should be sufficient to establish paternity

for purposes of allowing an illegitimate child to inherit from a father who dies intestate (see 430 U.S. at p. 772).* However, the Court did not suggest that this is the only method for making this determination. Our statute considers no alternatives and imposes a sine qua non requirement that an order of filiation be obtained during the lifetime of the father (EPTL, 4-1.2, subd [a], par [2]). For this reason, in light of *Trimble*, our statute fails to pass constitutional muster.

Accordingly, if paternity is established, the petition for an accounting should be granted.

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Upon reargument: Prior determination of this court affirming the decree of the Surrogate's Court adhered to, with costs. Opinion by Jones, J. All concur except Cooke, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

Decided November 17, 1977

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* This pronouncement by the Supreme Court warrants this observation. This Court does not "reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted 'during the pregnancy of the mother or within two years from the birth of the child' " because in this matter no order of filiation was made during the lifetime of the father (see slip opn, p 2, n 1). Nevertheless, it is difficult to ignore the fact that under our statutory scheme a public welfare official may institute a proceeding within 10 years of the birth of the child (Family Court Act, § 517, subd [b]) for purposes of requiring the father to provide support, and yet the order of filiation emanating from such proceeding would not allow the child to inherit from his or her father unless said proceeding was instituted within two years of the birth of the child (EPTL, 4-1.2, subd [a], par [2]; see *Matter of Flemm*, 85 Misc2d 855, 862).